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ELECTION BALLOTS — MISTAKES IN NAMES OF CANDIDATES.

Under the American system of voting, mistakes and irregularities in the forms of the ballots are frequently discovered by the judges of election in counting the votes. Where, as in England until a very recent date, all votes are given *viva voce*, and entered on the poll-books by the returning officer in the presence of the voter and the representatives of the candidates, it is easy to determine how any person has voted. And even since the adoption of the English Ballot Act, the various questions which have been presented to our courts, in regard to errors in votes, can not arise, because the ballots are issued by the government and contain the names of all the candidates printed thereon, the voter designating the person whom he favors, by marking a cross on the paper opposite his name. When, however, as in the United States, the voter himself is often called upon to write the name of the candidate on the ballot paper, it is obvious that mistakes will frequently happen. The voter is not always familiar with the candidate's Christian name or his initials; in many cases he may never have seen his name in print, or may be unable to spell it correctly. We propose, therefore, to discuss in this article the effect of irregularities which will often be found in ballot papers, viz.: mistakes in the names of candidates.

Judges of election are for the most part selected from citizens who have no exact knowledge of the legal principles which courts adopt in dealing with such matters, and it may therefore be well for them to know them, in order that they may not commit mistakes, which, though certain to be afterwards corrected, can only be corrected by litigation, at once expensive and dilatory. And first it may be stated as an axiom in the law of elections, that no member of the community who has honestly voted ought to lose his vote unless it is impossible to give it effect. This

principle runs through all the decisions of the American courts and of the American legislative bodies.¹ "All rules of law which are applied to the expression, in constitutional form, of the popular will, should aim to give effect to the intention of the electors; and any arbitrary rule which is to have any other effect without corresponding benefit is a wrong both to the parties who chance to be affected by it and to the public at large. The first are deprived of their offices, and the second of their choice of public servants." Such rules can not be sustained by considering voters as aggregated in two political parties, one of which is as likely to be affected by them as the other. Election contests are between individuals. A person who is deprived of his office by a technical and unjust rule, suffers a wrong which is not compensated by the fact that the same rule deprives a political opponent of his office and thereby balances the account between the parties by doing wrong to individuals.²

The intent of the voter being then the object to be sought, mere irregularity in the

¹ See cases, *passim*. Congress has frequently declared the true rule in such cases to be, that the intention of the voters should govern, and that the candidate is entitled to all ballots which it can be clearly ascertained were intended to be cast for him. At an election for member of Congress in Massachusetts in 1809, 1443 votes were cast for Charles Turner, Jr., and 430 for Charles Turner. It being proved that these together constituted a majority of the votes cast, and that there was no other Charles Turner in the district eligible for the office, the House awarded him the seat, as against the sitting member. *Turner v. Bayliss*, Cont. El. Cas. 235. A similar question arose in 1813 in two cases from New York (*Williams v. Bowlers*, Cont. El. Cas. 263; *Willoughby v. Smith*, Id. 265), and was decided in the same way. And a misnomer, occasioned by the mistake of the judges of election or clerks, has uniformly been corrected. In *Root v. Adams*, Cont. El. Cas. 271 (1815), 4182 votes had been cast in the eighth district of New York. Of these, 2214 were returned by the inspectors to the county clerks for Erastus Root, and 1968 for John Adams; but on certifying them to the Secretary of State, 576 votes were returned by mistake as for Erastus Root. The House unanimously allowed the returns to be corrected, and the petitioner took his seat. And see *Mallory v. Merrill*, Id. 328, (1819); *Guyon v. Sage*, Id. 348, (1819); *Colden v. Sharpe*, Id. 369, (1821); *Huguenin v. Ten Eyck*, Id. 501, (1825); *Wright v. Fisher*, Id. 519, (1829). *Contra*, *State v. Moffitt*, 5 Ohio, 358, where it was held that where the legislature had held an election, and the journal of one House described the candidate as "Lemuel" and that of the other as "Samuel," no evidence could be received to identify them.

² *Cooley, C. J.*, in *People v. Clecott*, 16 Mich. 283, (1868).

manner of executing it should not be regarded. How this intent can be best arrived at, and what evidence the judge of election at the polls, or the juror in a contested case, should consider, will be seen by a reference to the cases which have been passed upon by the courts. In a case in Wisconsin, the candidates for the office of district attorney being George B. Ely and Matthew H. Carpenter, a number of ballots were cast on the one hand for "George B. Ela," "Ely Ely," and "Ely," and on the other for "D. M. Carpenter," "M. D. Carpenter," "M. T. Carpenter," and "Carpenter." Upon the following facts, which were admitted in evidence subject to the respondent's objection as to their competency, all the ballots cast were counted for the different candidates: That before the election it was announced to the electors in all the newspapers of the county that George B. Ely and Matthew H. Carpenter would be and were candidates for the office of district attorney; that at this time there was no lawyer in the county eligible to the office of district attorney of the name of George B. Ela, Ely Ely, or Ely, and that there was no lawyer whose surname was Ely, except the respondent; that there was no lawyer in the county by the name of D. M. Carpenter, M. D. Carpenter, M. T. Carpenter, or whose surname was Carpenter, except the relator; that there were no votes cast in the county at said election for any persons of the names of Ely and Carpenter except for the office of district attorney, and that both the relator and respondent were practicing attorneys at the time in the county and eligible to the office. The evidence was held by the Supreme Court to have been properly admitted. "The principal question or matter in dispute," said Cole, J., "was to ascertain and determine for whom these votes with the different initials were intended. Were those given for Carpenter with the different abbreviations and initials intended to be cast and given for the relator, Matthew H. Carpenter? And were those given for Ely with the various initials and abbreviations, intended to be given for the respondent, George B. Ely? And how was this intention of the voter to be ascertained? By reading the name on the ballot and ascertaining who is designated or meant by that name? Is no evidence admissible to show who was in-

tended to be voted for under these various appellations, except such evidence as is contained in the ballot itself? Or may you not gather this intention of the voter from the ballot explained by the surrounding circumstances, from facts of a general public nature, connected with the election and the different candidates, which may aid you in coming to the right conclusion? These facts and circumstances might perhaps be adduced so clear and strong, as to lead irresistibly to the inference that a vote given for Carpenter was intended to be cast for Matthew H. Carpenter. A contract may be read by the light of surrounding circumstances, not to contradict it, but in order more perfectly to understand the intent and meaning of the parties who made it. By analogous principles we think that these facts, and others of like nature connected with the election, could be given in evidence for the purpose of aiding the jury in determining who was intended to be voted for."³ So where the candidate's name was Henry Frey Yates, and ballots cast for H. F. Yates were claimed for him, the court said: "That the relator frequently subscribed his name H. F. Yates; that he had formerly been clerk, and then was a candidate for that office; that people generally would apply these letters to the relator, and that no other person was known in the county to whom these initials were applicable—were facts which, if proven, would justify the jury in finding that those votes were intended for the relator."⁴ Again in a Connecticut case, where the question was whether votes cast for "Alvin J. Willoughby" should be counted for "Alvin L. Willoughby," the Supreme Court of Errors of Connecticut said: "It would be an easy matter to determine whether any elector in the fourth ward bore the name of Alvin J. Willoughby; for the names of all electors are found on the registry lists provided by law; and even if the names of some electors should have been omitted from the list by mistake, still in a district so limited in territory and population it could not be difficult to ascertain this fact. If no elector in the ward bore that name, or bore it with the exception of the second initial, the conclusion would be irre-

³ *Carpenter v. Ely*, 4 Wis. 420, (1856).

⁴ *People v. Ferguson*, 8 Cow. 102, (1827).

sistible that the ballots were intended to be cast for the relator, under the supposition that Alvin J. Willoughby was his name. In such a case, one could not entertain a doubt on the subject; for it must have been so, or else the freemen cast their ballots for a mere name, and for a person not in existence."⁵ In New York it has been held that not only facts of public notoriety may be given in evidence to show the intention of the elector, but that the voter who cast the ambiguous ballot, may give evidence as to whom he intended by it.⁶ But this doctrine has been criticised by other courts as inviting corruption and fraud.⁷ The true rule, in our opinion, is that announced by the courts of Wisconsin and Connecticut, and which is also concisely stated by Judge Cooley in a Michigan case,⁸ and repeated by him in his work on Constitutional Limitations:⁹ Evidence of such facts as may be called the circumstances surrounding the election, such as who were the candidates brought forward by the nominating conventions; whether other persons of the same name resided in the district from which the office is to be filled, and if so, whether they were eligible for the office and were publicly named for it, and the like is always admissible for the purpose of aiding in the application of any ballot which has been cast; and where the intent of the voter as expressed by his ballot when considered in the light of such surrounding circumstances is not doubtful, the ballot should be counted and allowed for the person intended. This rule is just and easy of application, and it has the merit of harmonizing with the rules applied to other written instruments. The jury in a contested case may require this proof to be brought before them; the judge of election, familiar with the candidates, may determine it for himself.

Subject to the above rule concerning the intention of the voter, mistakes like the following are held not to render the ballot invalid: Where the ballot gives the true initials of the candidate's name, as "E. M. Braxton" for

"Elliott M. Braxton,"¹⁰ "H. F. Yates" for "Henry F. Yates,"¹¹ "T. M. Gunter" for "Thomas M. Gunter,"¹² "J. R. Eastman" for "John R. Eastman;"¹³ or gives the surname alone without any Christian name or initial, as "Ely" for "George B. Ely,"¹⁴ "Gunter" for "Thomas M. Gunter,"¹⁵ "Braxton" for "Elliott M. Braxton,"¹⁶ "Carpenter" for "Matthew H. Carpenter,"¹⁷ "Talkington" for "Joseph Talkington;"¹⁸ or contains a title instead of a surname or initial, as "Judge Ferguson;"¹⁹ or gives a false middle initial, as "Thomas N. Gunter," for "Thomas M. Gunter,"²⁰ "Alvin J. Willoughby" for "Alvin L. Willoughby;"²¹ or a true first initial with a false name between it and the surname, as "T. Ross Gunter" for "Thomas M. Gunter;"²² or a true first initial with a false second initial, as, "M. D. Carpenter" and "M. T. Carpenter" for "Matthew H. Carpenter;"²³ or initials entirely incorrect, as "D. M. Carpenter" for "Matthew H. Carpenter;"²⁴ or contains no middle initial even though the candidate have one, as "Elliott Braxton" for "Elliott M. Braxton,"²⁵ "John Jochim" for "John W. Jochim,"²⁶ "Jonas Champney" for "Jonas A. Champney;"²⁷ or a middle initial where the person intended to be voted for had none, as "Benjamin C. Welch, Jr." for "Benjamin Welch, Jr.;"²⁸ or gives a false Christian name and no initial, as "Ely Ely" for "George B. Ely;"²⁹ or one initial only instead of the Christian name and middle initial, as "J. Champney" for "Jonas A. Champney."³⁰ Other mistakes which may arise in future

¹⁰ McKenzie v. Braxton, McCrary on El., 336.

¹¹ People v. Ferguson, 8 Cow. 102 (1827).

¹² Gunter v. Willshire, McCrary on El., 343.

¹³ People v. Seaman, 5 Denio, 409 (1848).

¹⁴ Carpenter v. Ely, 4 Wis. 420 (1856).

¹⁵ Gunter v. Willshire, McCrary on El., 343.

¹⁶ McKenzie v. Braxton, McCrary on El., 336.

¹⁷ Carpenter v. Ely, 4 Wis. 420 (1856).

¹⁸ Talkington v. Turner, 71 Ill. 234.

¹⁹ Chapman v. Ferguson, 1 Bartlett, 267.

²⁰ Gunter v. Willshire, McCrary on El., 343.

²¹ State v. Gates, 43 Conn. 533 (1876).

²² Gunter v. Willshire, McCrary on El., 343.

²³ Carpenter v. Ely, 4 Wis. 420 (1856).

²⁴ Carpenter v. Ely, 4 Wis. 420 (1856).

²⁵ McKenzie v. Braxton, McCrary on El., 336.

²⁶ People v. Kennedy, 37 Mich. 67, (1877).

²⁷ 3 Am. L. Rev. 142.

²⁸ People v. Cook, 14 Barb. 259 (1852); 8 N. Y. 67, (1853).

²⁹ Carpenter v. Ely, 4 Wis. 420 (1856).

³⁰ 3 Am. L. Rev. 142.

⁵ State v. Gates, 43 Conn. 533, (1876).

⁶ People v. Ferguson, 8 Cow. 102; People v. Pease, 27 N. Y. 45, 30 Barb. 583, (1863).

⁷ Carpenter v. Ely, 4 Wis. 420; Cooley on Const. Lim., 610.

⁸ People v. Cicott, post.

⁹ Cooley's Const. Lim., p. 612.

cases can be readily rectified, if the true test—the intention of the voters—be clearly borne in mind by the officers of election in counting the votes.

Neither will the misspelling of the candidate's name affect the ballot. In *People v. Mayworm*,³¹ there were cast for the office of sheriff: For John Burns, 369 votes; for Michael Finegan, 271; for Michael Finnegan, 175. The candidate's name was Michael Finnegan. "Finnegan" was considered *idem sonans* with "Finegan;" and the votes cast for the same name spelled in different ways, were counted by the court together. In this case it is worth noting, a majority of those who intended to vote for the candidate misspelled his name. In Wisconsin, ballots written "George B. Ela" were held properly counted for George B. Ely;³² and in Michigan it was said that votes cast for "Ed. Sekut" would be taken to be intended for Edward V. Cicott.³³

As the addition of "junior" to a name is a mere matter of description, and forms no part of the name,³⁴ it may be omitted on a ballot or, if added erroneously, should be treated as surplusage.³⁵

It is conceded, without question, that the abbreviation of the Christian name can not possibly affect the ballot, provided it be the proper or a commonly received abbreviation; as, for example, "Geo." for "George," "Hen." for "Henry,"³⁶ "Wm." and "Willm." for "William,"³⁷ "Jas." for "James,"³⁸ "Geo." for "George," or "Thos." for "Thomas;"³⁹ and even though the abbreviation might also represent a

different name, as "Ed." for "Edward," when it might also stand for "Edmund" or "Edwin" or "Edgar."⁴⁰ Where a statute required the election of aldermen of boroughs to be by vote of the councilmen, who should each personally deliver to the chairman of the meeting at which such election was held, a voting paper containing the "Christian name and the surname" of the persons for whom he voted, it was ruled in the Court of Queen's Bench that the contraction of the Christian name, or even a misspelling of it, would not render it void; and voting papers inscribed, "Wm. Bradley" and "Willm. Bradley," were admitted as votes for William Bradley. All of the judges agreed that a well-known contraction of a name which can not be misunderstood is tantamount to the name in full.⁴¹

In Michigan, the Supreme Court as early as 1843, laid down a rule which it has subsequently adhered to with regret. In *People v. Tisdale*,⁴² it was held that unless a ballot showed upon its face for whom it was intended, it could not be counted, and that, therefore, extrinsic evidence was not admissible to show that ballots cast for "J. A. Dyer" were intended for "James A. Dyer." The question was again presented eleven years later, when the court ruled that no evidence could be allowed to prove that votes cast for "H. T. Higgins" were intended for "Henry T. Higgins."⁴³ In *People v. Cicott*,⁴⁴ the court followed *People v. Tisdale*, because the rule had become the established law of the State. "I am compelled to say," said Christianey, J., "that but for that decision I should have been disposed to hold that, upon principle, extrinsic evidence might be given tending to show for whom the vote was intended, as that the candidates were in the habit of thus writing their names; that they were as well known respectively by the name of E. V. Cicott and G. O. Williams, as by Edward V. and Guerdon O.; that they were opposing candidates at the election for the same office, and that no other person of the same surname and the same initials was known

³¹ 5 Mich. 146.

³² *Carpenter v. Ely*, 4 Wis. 420. In Alabama a ballot for "Pence," where the candidate's name was "Spence," was rejected by the judges of election, the voter stating that he did not intend to vote for the office in question at all, and had taken that method to make his vote of no account. *State v. Judge*, 13 Ala. 805.

³³ *People v. Cicott*, 16 Mich. 283 (1868).

³⁴ *Fleet v. Young*, 11 Wend. 524; *Blake v. Tucker*, 12 Vt. 45; *Kincaid v. Howe*, 10 Mass. 203; *Leprot v. Brown*, 1 Salk. 7; *Cobb v. Lucas*, 15 Pick. 9; *Padgett v. Laurence*, 10 Paige, 177.

³⁵ *People v. Cook*, 14 Barb. 259; 8 N. Y. 67; *Turner v. Bayliss*, Cont. El. Cas. 235; *People v. Cicott*, 16 Mich. 283 (1868).

³⁶ *People v. Ferguson*, 8 Cow. 102 (1829).

³⁷ *Queen v. Bradley*, 3 El. & El. 634 (1861).

³⁸ *People v. Tisdale*, 1 Doug. 59 (1843).

³⁹ *People v. Tisdale*, *supra*.

⁴⁰ *People v. Cicott*, 16 Mich. 283 (1868).

⁴¹ *Queen v. Bradley*, 3 El. & El. 634 (1861).

⁴² 1 Doug. 59 (1843); see also *Opinion of the Judges*, 28 Me. 597 (1855).

⁴³ *People v. Higgins*, 3 Mich. 233 (1854).

to be running for the office. This is in strict accordance with the rule which prevails in the construction of all other written instruments which are to be read in the light of the surrounding circumstances. But the rule in *People v. Tisdale*⁴⁵ was recognized in *People v. Higgins*,⁴⁶ and has now been the settled law of this State for a quarter of a century." Cooley, C. J., in an elaborate and unanswerable opinion, was in favor of departing from the rule of *People v. Tisdale*: "I regret," said he, "that my brethren are disposed to still follow the case of *People v. Tisdale*, notwithstanding the majority are of opinion that it is unsound in principle. The case has no support, as I think, either in the authorities or in the analogies of the law, and no court outside the State has ever followed it. * * * The chief argument in favor of the rule of *People v. Tisdale* is that ballots cast for parties by their initials only, are so uncertain that they can not be applied without extrinsic and doubtful evidence to ascertain the voter's intention, and, therefore, should be rejected. But nothing can be more fallacious. It frequently happens that a man is better known by the initials of his baptismal name than by the name fully expressed; simply because he is not in the habit of writing his name in full, or being thus addressed in business transactions. I think it highly probable that that is the case with each of the parties before us. In political conventions or legislative bodies no one deems it important to write the full name of a candidate for whom he is voting, and no one ever thinks of challenging the vote for uncertainty. Under the application of this rule to the present case the curious spectacle will be exhibited of votes cast for E. V. Cicott and G. O. Williams being rejected because the courts can not determine for whom they were intended, while not a single person in the County of Wayne has the slightest doubt that they were cast for Edward V. Cicott and Guerdon O. Williams, the opposing candidates at this election. Thus the courts are required to close their eyes to what every body else can see distinctly. The fallacy of the rule consists in its assuming that a certain form of ballot clearly expresses

the voter's intention, while another form is so uncertain that it is dangerous to attempt to arrive at the meaning by evidence. But in fact no ballot can identify with positive certainty the persons for whom it is cast; and notice must be taken of extrinsic circumstances in order to apply it. It is always possible that other persons may reside in the election district having the same names with some of the candidates, but neither the canvassers nor the courts ever assume that there is any difficulty in these cases, but they count the votes for the persons who have been put forward for the respective offices. And in some cases where an element of uncertainty is introduced into the ballot unnecessarily, as by the addition of an erroneous designation, the courts resolve the difficulty by rejecting the erroneous addition and counting the ballot for the person for whom it was evidently designed. If the rule were one which the canvassers could apply in every case, and which left nothing open for controversy in the courts afterwards, it would be less open to objection, but it is not of that character. No one doubts that if votes had been cast in this case for Edward Cicott or Edward B. Cicott, or Edward Cicott, junior, or Edward Cicott with any other mistaken addition, they must have been counted for the respondent on the facts appearing in this case.⁴⁷ Such ballots would be allowed because the error of the voter is not so great, when the facts surrounding the election are considered, as to leave his intent in real doubt; yet no one can fail to see that in every one of these cases the room for doubt is greater than in the case of ballots for E. V. Cicott, and that whatever doubt exists is referred to courts and juries for solution in the one case as it would be in the other. The rule therefore rejects a certain class of ballots on reasons which apply with at least equal force to others which are admitted. And its indefensible character is still more apparent when we consider that abbreviated ballots are received as well as those which are misspelled, so that a vote for Ed. Sekut would be counted though the Ed. is an abbreviation for several other names besides Edward, and no one would suppose that by this name the person intended was as distinctly

⁴⁴ 16 Mich. 283.

⁴⁵ *Supra*.

⁴⁶ *Supra*.

⁴⁷ *People v. Cook*, 14 Barb. 259; 8 N. Y. 67; *Milk v. Christie*, 1 Hill 102; *Bratton v. Seymour*, 4 Watts, 329.

pointed out as if the name had been written as it commonly is in business transactions."⁴⁸

CHARGING A TRUSTEE OR EXECUTOR WITH INTEREST.—II.

We referred last week to the rule which has been laid down that where it can be shown to be necessary to meet the exigencies of the testator's affairs that moneys belonging to his estate should be kept uninvested, executors will not be charged with interest on them. What will be considered as an exigency justifying the executor in keeping money uninvested is, to some extent, indicated in the judgment in *Tebbs v. Carpenter*, 1 Mad. 299. In that case it appeared that the executors had in their hands, at the end of the first year after the testator's death, a sum of £790, and they alleged that it was necessary to keep this balance in hand to meet the exigencies of the next year. Sir T. Plumer, M. R., said that this argument would have had weight "if, in fact, it was necessary to keep the balance in hand, and there were pressing demands which required it, but the current receipts were greatly more than sufficient to answer the current payments;" hence he charged the executors with interest. It is to be observed that in this case there was an express direction to the executors in the will to invest portions of the estate not required; but it would seem that, in order to avoid payment of interest, the executor must show that he had reasonable ground for believing that the money kept in hand would be needed to meet pressing demands which subsequent expected current receipts would not suffice to meet. He must consider, at the end of the first year after the testator's death, whether the balance he has in hand is greater than will be required to meet the payments he will have to make within the next year, and he must not suppose that he will be justified in keeping a sum uninvested because he happens to find it so at the testator's death. It has been laid down that if an executor finds a large sum of money at the testator's bankers, and does not invest it for the benefit of the estate, he will be charged with interest. *Williams v. Powell*, 15 Beav. 467.

Before, however, the court will charge executors with interest on balances, it requires clear and distinct evidence that there was a balance in their hands. It will not act upon a mere probability or inference. *Davenport v. Stafford*, 14 Beav. 319, 333. In the last-mentioned case it appeared that a testatrix, who was herself an executrix, had in that capacity received a sum of £12,510 assets. Her executors having admitted assets to pay all her debts, the court was asked to infer that this sum had come to their hands; but the Master of the Rolls held that, in the absence of any further proof, the executors were not liable for interest. "It is probable," the court said, "as they admitted assets, that they had assets (of

their testatrix) in their hands applicable to the payment of this sum; yet it is exceedingly probable that the whole of these assets might have been outstanding at the time, although when got in they might have been amply sufficient for the payment of everything which should be found due from the estate. There is nothing whatever to show that they might have been since recovered from year to year; and there is no evidence whatever that any cash actually came to their hands upon the death of the testatrix, though, to charge them, it is absolutely essential to have that fact established." 14 Beav. 333.

Moreover, it appears that in order to give a claim for interest against executors, there must be a clear case of improper retention of balances to a considerable or substantial amount. *Jones v. Morrell*, 2 Sim. N. S., 252. In this case the total balance retained, arising out of the personal estate, amounted to less than £96, and the total share of the rents of the leasehold estate to about £88, and the court refused to charge the executors with interest. See also *Davenport v. Stafford*, 14 Beav. 330, where the principle upon which the court acts was stated by Romilly, M. R., as being that, if a trustee improperly retains in his hands a large balance, he will be charged with interest on the balance; and *Longmore v. Broom*, 7 Ves. 124, where executors were charged with interest on balances since 1793, "no considerable balance appearing to have been in their hands before that period." The question of what is to be deemed a balance of substantial amount improperly retained must, it is apprehended, be decided by a consideration of the total value of the estate. In *Melland v. Gray*, 2 Coll. 295, *Knight Bruce, V.C.*, held that the sum of £356 8s. 4d. was not an unreasonable sum to be retained by an executor nearly two years after the testator's death, and declined to charge him with interest on that sum; see p. 301. But in this case the executor had received over £27,000 on account of the testator's personal estate.

It has often been laid down that a trustee or executor who keeps trust money in his hands uninvested shall be charged with the same rate of interest as he has actually made or may fairly be presumed to have made by it. *Burdick v. Garrick*, 18 W. R. 387, L. R. 5 Ch. 243; *Lee v. Lee*, 2 Vern. 547; *Rocke v. Hart*, 11 Ves. 60; *Attorney-General v. Alford*, 4 De G. M. & G. 851. The rule which is acted upon, however, seems to be that the court will charge the executor or trustee with simple interest at four per cent. per annum. *Rocke v. Hart*, 11 Ves. 61; *Forbes v. Ross*, 2 Cox, 116; *Attorney-General v. Alford*, 4 De G. M. & G. 843, 851; *In re Hilliard*, 1 Ves. jun., 89; *Jones v. Foxall*, 15 Beav. 392; *Knott v. Cottee*, 16 Beav. 80; *Robinson v. Robinson*, 1 De G. M. & G. 255; *Johnson v. Prendergast*, 28 Beav. 480; *Saltmarsh v. Barrett* (No. 2) 31 Beav. 350; unless a special case is made out (*Treves v. Townshend*, 1 Bro. C. C. 386; *Hall v. Hallett*, 1 Cox 138; *Tebbs v. Carpenter*, 1 Mad. 306; *Woodhead v. Marriott*, C. P. Cooper, 62), showing that the trustee or executor either has or ought to have made interest on the

⁴⁸ And see *Crawford v. Molitor*, 23 Mich. 341 (1871).

trust money at a rate exceeding four per cent. per annum. The mere fact that a trustee or executor has mixed the trust money with his own money is no reason for charging him with a higher rate of interest than four per cent. per annum. See *Perkins v. Baynton*, 1 Bro. C. C. 375; *Attorney-General v. Alford*, 4 DeG. M. & G. 843, 847; *Melnd v. Gray*, 2 Coll. 295, 306.*

Under the following circumstances an executor or trustee will be charged a higher rate of interest than four per cent. per annum:—

1. If a higher rate than four per cent. per annum has been actually made by the executor or trustee. In this case the court will charge him with the rate of interest he has made. *Forbes v. Ross*, 2 Cox, 116; *Hall v. Hallet*, 1 Cox, 138; *Gilbert v. Price*, 22 Sol. J. 584, W. N. 1878, p. 117; *In re Hilliard*, 1 Ves. jun. 89 (as to assignee of bankrupt); but see *Fletcher v. Green*, 33 Beav. 426, where trustees, in breach of trust, lent trust money to one of themselves and his partners in trade, who gave their bond for the sum and interest at five per cent.; it was held, in a suit to make the trustees liable for breach of trust, that the trustee to whom the money was lent was liable only to pay four per cent.

2. If the trust fund has been taken by the trustee or executor from a proper state of investment, in which it was producing five per cent., and used by himself. In this case he will be charged with interest at the rate of five per cent. *Jones v. Foxall*, 15 Beav. 392; *Piety v. Stace*, 4 Ves. 620; *Mosley v. Ward*, 11 Ves. 581; *Raphael v. Boehm*, 13 Ves. 407, 411; see *Taylor v. Gerst*, *Moseley*, 99; *Pocock v. Reddington*, 5 Ves. 799. In *Crackett v. Bethune*, 1 Jac. & W. 586, an executor who had unnecessarily sold out and retained funds invested in the three per cents. was charged with interest at five per cent. per annum "for a direct breach of trust," but it is apprehended that this is inconsistent with the principle of the recent decisions; unless (as rather appears from the judgment, see page 588), the executor had employed the money in trade. On principle it would seem that if the trust fund at the time it was sold out was producing, on a proper investment, more than five per cent. per annum, the trustee or executor must be charged with the rate of interest which the fund was producing before the sale. This does not seem to have been laid down in any judgment, but probably this is due to the fact that few authorized investments will produce a higher rate of interest than five per cent.

3. If the trustee or executor has employed the trust money in trade or speculation for his own benefit, whether he has employed it in a separate business or adventure, or mixed it with his own money and employed it in a business of his own.

* An attempt has been made to explain the different rates of interest with which executors are charged as depending upon the distinction between negligence and misfeasance (*Tebbs v. Carpenter*, 1 Mad. 306); but this distinction does not correspond with the circumstances under which the different rates have been charged, and is contrary to the principle on which, in recent times, the charging of interest in these cases has been based.

(*Docker v. Somes*, 2 My. & K. 665, 667), he will be liable for all losses, and will be charged with all the profits actually obtained by him from the use of the money (*Docker v. Somes*, 2 My. & K. 655), or at the option of the *cestui que trust*, or in case it can not be ascertained what profits have been made (*Montgomery v. Wauchope*, 4 Dow., 131; *Walker v. Woodward*, 1 Russ. 107), with interest at five per cent. per annum, on the presumption that this rate of interest will be made on money employed in trade. *Jones v. Foxall*, 15 Beav. 392; *Heathcote v. Hulme*, 1 J. & W. 122; *Ex parte Watson*, 2 Ves. & B. 414; *Attorney-General v. Solly*, 2 Sim. 518; *Western v. Chapman*, 1 Coll. 177, 181; *Brown v. Sansome*, 1 McCl. & Y. 427, 434; *Sutton v. Sharp*, 1 Russ. 150, 151; *Saltmarsh v. Barrett* (No. 2), 31 Beav. 350; *Flockton v. Bunning*, L. R. 8 Ch. 223, note; *Vyse v. Foster*, L. R. 8 Ch. 329. The *cestui que trust* can not claim both interest and profits in respect of the money employed in trade; he must elect between them (*Vyse v. Foster*, L. R. 8 Ch. 334); and it has been said that in general he must elect to take either the profits for the whole period during which the money has been employed in business, or interest for the whole period, but there may be circumstances which would be sufficient to divide such period. *Heathcote v. Hulme*, 1 J. & W. 122, 133; *Buridan v. Burdan*, Id. 134. The ground on which this right rests is this. The employment in trade is unwarrantable; but if it turns out to have been profitable, the *cestui que trust* has a right to follow the money, as it is said, into the trade. In such a case the trade profits have, in fact, been produced by the employment of the money of the *cestui que trust*, and it would be manifestly unjust to permit the trustee to rely on his own misconduct in having exposed the funds to the risk of trade as a reason for retaining the extra profits beyond interest for his own benefit. Even where no such extra profits have been made, the *cestui que trust* is in general at liberty to charge his trustee who has allowed the trust money to be employed in trade with interest at five per cent. that being the ordinary rate of interest paid on capital in trade. *Robinson v. Robinson*, 1 De. G. M. & G., p. 257.

LIABILITY OF DIRECTORS OF SAVINGS BANKS.

HUN v. CAREY.

Court of Appeals of New York, September, 1880.

1. Trustees and directors of savings banks are bound to the exercise of skill and judgment as well as care and diligence. The remarks of Sharswood, J., in *Spring's Appeal*, 71 Pa. St. 11, that directors "are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest," condemned.

2. A savings bank commenced business in 1867. At the beginning of 1873 its total expenses were over \$5,000 more

than its income. Its depositors numbered \$1,000, representing \$70,000, and its assets consisted of \$13,000 in cash and a number of mortgages on real estate. Shortly afterwards the directors, in order to inspire confidence and attract depositors, resolved to erect a new banking house, and for this purpose purchased a lot for \$29,250, and bound themselves to erect thereon a building costing \$27,000. To pay for this building most of the money was taken and some of the mortgages sold. In consequence thereof the bank became unable to continue, and was placed in the hands of a receiver. *Held*, that the jury was justified in finding the directors guilty of a want of that skill and prudence which the law requires.

EARL, J., delivered the opinion of the court:

This action was brought by the receiver of the Central Park Savings Bank of the City of New York against the defendants, who were trustees of the bank, to recover damages which, it is alleged, they caused the bank by their misconduct as such trustees.

The first question to be considered is the measure of fidelity, care and diligence, which such trustees owe to a bank and its depositors. The relation existing between the corporation and its trustees is mainly that of principal and agent; and the relation between the trustees and the depositors is similar to that of trustee and *cestui que trust*. The trustees are bound to observe the limits placed upon their powers in the charter, and if they transcend such limits, and cause damage, they incur liability. If they act fraudulently or do a wilful wrong, it is not doubted that they may be held for all the damage they cause to the bank or its depositors. But if they act in good faith within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. That the trustees of such corporations are bound to use some diligence in the discharge of their duties, can not be disputed. All the authorities hold so. What degree of care and diligence are they bound to exercise? Not the highest degree; not such as a very vigilant or extremely careful person would exercise. If such were required, it would be difficult to find trustees who would incur the responsibility of such trust positions. It would not be proper to answer the question by saying the lowest degree. Few persons would be willing to deposit money in savings banks or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them—the same degree of care and prudence that men prompted by self interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice and public policy

unite in requiring of him such degree of care and prudence, and it is a gross breach of duty, *crassa negligentia*, not to bestow them.

It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied. *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278. What would be slight neglect in the care of a quantity of iron, might be gross neglect in the care of a jewel. What would be slight neglect in the care exercised in the affairs of a turnpike corporation, or even of a manufacturing corporation, might be gross neglect in the care exercised in the management of a savings bank entrusted with savings of a multitude of poor people, depending for its life upon credit and liable to be wrecked by the breath of suspicion. There is a classification of negligence to be found in the books—not always of practical value, and yet sometimes serviceable—into slight negligence, gross negligence, and that degree of negligence intermediate between the two, attributed to the absence of ordinary care; and the claim on behalf of these trustees is that they can only be held responsible in this action in consequence of gross negligence, according to this classification. If gross negligence be taken according to its ordinary meaning, as something nearly approaching fraud or bad faith, I can not yield to this claim; and if there are any authorities upholding the claim, I emphatically dissent from them.

It seems to me that it would be a monstrous proposition to hold that trustees entrusted with the management of the property, interests and business of other people, who divest themselves of the management and confide in them, are bound to give only slight care to the duties of their trust, and are liable only in case of gross inattention and negligence; and I have found no authority fully upholding such a proposition. It is true that authorities are found which hold that trustees are liable for *crassa negligentia*, which literally means gross negligence; but that axiom has been defined to mean the absence of ordinary care and diligence adequate to the particular case.

In *Scott v. De Peyster*, 1 Ed. Ch. 513, 543, a case much cited, the learned vice chancellor said: "I think the question in all such cases should and must necessarily be, whether they [directors] have omitted that care which men of common prudence take of their own concerns? To require more would be adopting too rigid a rule and rendering them liable for slight neglect; while to require less would be relaxing too much the obligation which binds them to vigilance and attention in regard to the interests of those confided to their care, and expose them to liability for gross neglect only, which is very little short of fraud itself." In *Spering's Appeal*, 71 Pa. St. 11, *Sharswood, J.*, said: "They [directors] can only be regarded as mandataries—persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more." In *Hodges v. New England Screw Co.*, 1 R. I. 312, *Jenckes, J.*,

said: "The sole question is whether the directors have or have not bestowed proper diligence. They are liable only for ordinary care—such care as prudent men take in their own affairs." And in the same case, Ames, J., said: "They should not, therefore, be liable for innocent mistakes, unintentional negligence, honest errors of judgment, but only for wilful fraud or neglect, and want of ordinary knowledge and care." The same case came again under consideration in 3 R. I. 9, and Green, C. J., said: "We think a board of directors, acting in good faith, and with reasonable care and diligence, who nevertheless fall into a mistake, either as to law or fact, are not liable for the consequences of such mistake." In the case of Liquidators of Western Bank v. Douglas, 11 Sess. Laws, 3d Ser., 112, Scotch, it is said: "Whatever the duties [of directors] are, they must be discharged with fidelity and conscience, and with ordinary and reasonable care. It is not necessary that I should attempt to define where excusable remissness ends and gross negligence begins. That must depend to a large extent on the circumstances. It is enough to say that gross negligence in the performance of such duty, the want of reasonable and ordinary fidelity and care, will impose liability for loss thereby occasioned." In Charitable Corporation v. Sutton, 2 Atkyns, 405, Lord Chancellor Hardwicke said that a person who accepted the office of director of a corporation, "is obliged to execute it with fidelity and reasonable diligence," although he acts without compensation. In Litchfield v. White, 3 Sandf. 545, Sandford, J., said: "In general, a trustee is bound to manage and employ the trust property for the benefit of the *cestui que trust* with the care and diligence of a provident owner. Consequently he is liable for every loss sustained by reason of his negligence, want of caution or mistake as well as positive misconduct."

In Spering's Appeal, Sharswood, J., said that directors "are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body." As I understand this language, I can not assent to it as properly defining to any extent the nature of a director's responsibility. Like a mandatary, to whom he has been likened, he is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he can not set up that he did not possess them. When damage is caused by his want of judgment, he can not excuse himself by alleging his gross ignorance. One who voluntarily takes the position of director and invites confidence in that relation, undertakes like a mandatary, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. Story on Bailments, sec. 182. Such is the rule applicable to public officers, to professional men and to mechanics, and

such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge, and it matters not that the service is to be rendered gratuitously.

These defendants voluntarily took the position of trustees of the bank. They invited depositors to confide to them their savings, and to entrust the safe-keeping and management of them to their skill and prudence. They undertook not only that they would discharge their duties with proper care, but that they would exercise the ordinary skill and judgment requisite for the discharge of their delicate trust.

Enough has now been said to show what measure of diligence, skill and prudence the law exacts from managers and directors of corporations, and we are now prepared to examine the facts of this case for the purpose of seeing if these trustees fell short of this measure in the matters alleged in the complaint.

This bank was incorporated by the act, chapter 467 of the laws of 1867, and it commenced business in the spring of that year in a hired building on the east side of Third avenue in the City of New York. It remained there for several years, and then removed to the west side of the avenue between Forty-fifth and Forty-sixth streets, where it occupied hired rooms until near the time of its failure in the fall of 1875. During the whole time the deposits averaged only about \$70,000. In 1867 the income of the bank was \$942.12, and the expenses, including amounts paid for safe, fixtures, charter, current expenses and interest to depositors, were \$5,571.34. In 1868 the income was \$5,471.43, and the expenses, including interest to the depositors, \$5,719.43. In 1869 the income was \$3,918.27, and the expenses and interest paid \$5,346.05. In 1870, the income was \$5,784.09, and expenses and interest \$7,040.22. In 1871, the income was \$13,551.14, which included a bonus of \$4,000 or \$6,000, obtained upon the purchase of a mortgage of \$40,000, which mortgage was again sold in 1874 at a discount of \$2,000, and the expenses, including interest paid, were \$9,124.05. In 1872 the income was \$5,100.51, and the expenses, including interest paid, were \$7,212.49. Down to the first day of January, 1873, therefore, the total expenses, including interest paid, were \$5,046 more than the income. To this sum should be added \$2,000, deducted on the sale of the large mortgage in 1874, which was purchased at the large discount in 1871, as above mentioned, and yet entered in the assets at its face. From this apparent deficiency should be deducted the value of the safe and furniture of the bank, from which the receiver subsequently realized \$500. At the same date the amount due to over 1,000 depositors was about \$70,000, and the assets of the bank consisted of about \$13,000 in cash, and the balance mostly of mortgages upon real estate.

While the bank was in this condition, with a lease of the rooms then occupied by it expiring May 1, 1874, the project of purchasing a lot and erecting a banking house thereon began to be

talked of among the trustees. The only reason put on record in the minutes of the meetings held by the trustees for procuring a new banking house was to better the financial condition of the bank. In February, 1873, at a meeting of the trustees, a committee was appointed "on a site for a new building;" and in March the committee entered into contract for the purchase of a plot of land, consisting of four lots, on the corner of Forty-eighth street and Third avenue, for the sum of \$74,500, of which \$1,000 was to be paid down, \$9,000 on the first day of May then next, and \$64,000 to be secured by a mortgage, payable on or before May 1, 1875, with interest from May 1, 1873, at seven per cent.; and there was an agreement that payment of the principal sum secured by the mortgage might be extended to May 1, 1877, provided a building should, without unavoidable delay, be erected upon the corner lot, worth not less than \$25,000. This contract was reported by the committee to the trustees at a meeting held April 7. On the first day of May, 1873, the real estate was conveyed and the cash payment was made, and four separate mortgages were executed to secure the balance, one upon each lot. The mortgage upon the lot upon which the bank building was afterwards erected was for \$30,500. At the same time the bank became obligated to build upon that lot a building covering its whole front, twenty-five feet, and sixty feet deep, and not less than five stories high, and have the same inclosed by the first day of November then next. Upon that lot the bank proceeded, in the spring of 1875, to erect a building covering the whole front and seventy-six feet deep and five stories high, at an expense of about \$27,000, and the building was nearly completed when the receiver of the bank was appointed in November of that year. The three lots not needed for the building were disposed of, as we may assume, without any loss, leaving the corner lot used for the building to cost the bank \$29,250; and we may assume that that was then the fair value of the lot. This case may then be treated as if these trustees had purchased the corner lot at \$29,250, and bound themselves to erect thereon a building costing \$27,000. When the receiver was appointed, that lot and building, and other assets which produced less than \$1,000, constituted the whole property of the bank; and subsequently the lot and building were swept away by a mortgage foreclosure, and this action was brought to recover the damages caused to the bank by the alleged improper investment of its funds, as above stated, in the lot upon which the building was erected. At the time of the purchase of the lot, the bank was substantially insolvent. If it had gone into liquidation, its assets would have fallen several thousand dollars short of discharging its liabilities, and this state of things was known to the trustees. It had been in existence about six years, doing a losing business. The amount of its deposits, which its managers had not been able to increase, shows that the enterprise was an abortion from the beginning;

either because it lacked public confidence, or was not needed in the place where it was located. It had changed its location once without any benefit. It had on hand but about \$13,000 in cash, of which \$10,000 were taken to make the first payments. The balance of its assets was mostly in mortgages not readily convertible. One was a mortgage for \$40,000, which had been purchased at a large discount, and we may infer that it was not very salable, as the trustees resolved to sell it as early as May, 1873, and in August, 1873, authorized it to be sold at a discount of not more than \$2,500, and yet it was not sold until 1874. In this condition of things, the trustees made the purchase complained of, under an obligation to place on the lot an expensive banking house. Whether under the circumstances the purchase was such as the trustees, in the exercise of ordinary prudence, skill and care could make, or whether the act of purchase was reckless, rash, extravagant, showing a want of ordinary prudence, skill and care, were questions for the jury. It is not disputed that under the charter of this bank, as amended in 1868, (chapter 294), it had the power to purchase a lot for a banking house, "requisite for the transaction of its business." That was a power, like every other possessed by the bank, to be exercised with prudence and care. Situated as this moribund institution was, was it a prudent and reasonable thing to do, to invest nearly half of all the trust funds in this expensive lot, with an obligation to take most of the balance to erect thereon an extravagant building? The trustees were urged on by no real necessity. They had hired rooms where they could have remained; or if these rooms were not adequate for their small business, we may assume that others could have been hired. They put forward the claim upon the trial that the rooms they then occupied were not safe. That may have been a good reason for making them more secure, or for getting other rooms, but not for the extravagance in which they indulged. It is inferable, however, that the principal motive which influenced the trustees to make the change of location was to improve the financial condition of the bank by increasing its deposits. Their project was to buy this corner lot and erect thereon an imposing edifice, to inspire confidence, attract attention and thus draw deposits.

It was intended as a sort of advertisement of the bank; a very expensive one indeed; savings banks are not organized as business enterprises. They have no stockholders, and are not to engage in speculation or money-making in a business sense. They are simply to take the deposits, usually small, which are offered, aggregate them and keep and invest them safely, paying such interest to the depositors as is thus made, after deducting expenses, and paying the principal upon demand. It is not legitimate for the trustees of such a bank to seek deposits at the expense of present depositors. It is their business to take deposits when offered. It is not proper for these trustees, or at least the jury may have found that it was not, to take the money then on deposit and

invest it in a banking house merely for the purpose of drawing other deposits. In making this investment the interests of the depositors, whose money was taken, can scarcely be said to have been consulted.

It matters not that the trustees purchased this lot for no more than a fair value, and that the loss was occasioned by the subsequent general decline in the value of real estate. They had no right to expose their bank to the hazards of such a decline. If the purchase was an improper one when made, it matters not that the loss came from the unavoidable fall in the value of the real estate purchased. The jury may have found that it was grossly careless for the trustees to lock up the funds in their charge in such an investment, where they could not be reached in any emergency which was likely to arise in the affairs of the crippled bank. We conclude, therefore, that the evidence justified a finding by the jury that this was not a case of mere error or mistake of judgment on the part of the trustees, but that it was a case of improvidence, of reckless, unreasonable extravagance, in which the trustees failed in that measure of reasonable prudence, care and skill which the law requires.

Judgment affirmed. All concur.

SALES—VENDOR'S MISTAKE AS TO PRINCIPAL.

STODDARD v. HAM.

Supreme Judicial Court of Massachusetts, January Term, 1880.

A mistake by the vendor in a sale on credit as to the person upon whose credit such sale is made, will not, in the absence of fraud on the part of the vendee, invalidate the sale. Where, therefore, L, upon whose credit the plaintiffs would not have sold, purchased, without fraud, certain bricks of the plaintiffs, which they sold to him solely on the credit of the defendant, supposing him to be the agent of the latter, though nothing concerning the fact of such agency was said, and L thereafter sold the same to the defendant, against whom, after due demand for the return or the price of the bricks, the plaintiffs brought an action of tort, it was held that the plaintiffs could not recover.

This was an action of tort. The case was heard by the court without a jury.

It appeared in evidence that the plaintiffs were manufacturers of and dealers in brick at Bangor, Me. The bricks, which were the subject of this suit, were purchased at Bangor of the plaintiffs by one Charles E. Leonard, who was doing a commission business in that city, but sometimes buying on his own account.

The court found as facts, established by the evidence, that the plaintiffs supposed that they were selling these bricks to the defendant through Leonard as his agent, and that they were sold on the credit of defendant solely, and would not have been sold on the personal credit of said Leonard, but that in truth the said Leonard was not the agent of

defendant in said purchase and had no authority to bind him. It was not established that said Leonard was guilty of any false representations as to agency, but the court found it to have been a case of error and mistake on the part of the plaintiffs as to the principal with whom they were dealing.

It appeared that the bricks were bought upon a short credit, and were immediately sold by Leonard to the defendant, and that they were, in fact, bought with a view to such sale. The bricks remained in the plaintiffs' yard and possession until after the sale by Leonard to Ham, and were afterwards delivered by the plaintiffs at a wharf in Bangor, as directed by Leonard, and by him shipped to Ham; Leonard taking the bills of lading from the captains in his own name. Leonard sold other bricks to said defendant, at or about the same time, and drew drafts against said aggregate cargoes, which were accepted and paid by defendant, who also paid the freight on account of Leonard, the defendant, to have the bricks at a fixed price delivered in Boston. From the proceeds certain payments were made to the plaintiffs by Leonard, which they supposed were made on account of the defendant and which appear as credits in their declaration. After the bricks were all delivered, Leonard failed in business, and no other payments were made. Leonard was largely indebted to the defendant, and he offset the claim of Leonard for the balance due him on the bricks by this antecedent indebtedness.

After Leonard stopped payment, the plaintiffs made due demand on the defendant for the bricks, claiming that they had never parted with the property in them, if defendant repudiated the agency of Leonard, and offered to repay defendant for all advances and expenses incurred by them, but the defendant refused to deliver them, and claimed to hold by purchase from Leonard.

Upon these facts the court held, as matter of law, that the plaintiff could not recover, ordered judgment for the defendant, and reported the case to this court.

S. H. Tyng, for plaintiffs; *N. Morse*, for defendant.

COLT, J., delivered the opinion of the court:

This case was tried without a jury, and there is no reason to doubt that, upon the facts found by the judge, it was correctly ruled that the plaintiff could not recover in tort for the conversion of the property in dispute.

It is not enough to give the plaintiffs a right to recover, that they supposed they were selling bricks to the defendant, through Leonard, his agent, and that they would not have sold them to Leonard on his sole credit. The judge found that they were in fact sold to Leonard; and the evidence justifies his finding. There was no fraud, no false representations of agency, or pretense on the part of Leonard, that he was buying for any one else. He was a commission merchant, who was in the habit of purchasing goods on his own account, and who honestly bought the bricks for himself and sold them to the defendant as his

own. It was not a case of mistaken identity. The plaintiffs knew that they were dealing with Leonard; they did not mistake him for the defendant; nothing was said as to any other party to the sale. The conclusion is unavoidable that the contract was made with him. The difficulty is that the plaintiffs, if they had any other intention, neglected then to disclose it. It was a mistake on one side, of which the other had no knowledge or suspicion, and which consisted solely in the unauthorized assumption that Leonard was acting as agent for a third person, and not for himself.

It is elementary in the law governing contracts of sale and all other contracts, that the agreement is to be ascertained exclusively from the conduct of the parties, and the language used when it is made, as applied to the subject matter and to known usages. The assent must be mutual, and the "union of minds" is ascertained by some medium of communication. A proposal is made by one party and is acceded to by the other in some kind of language mutually intelligible, and this is mutual assent. *Metcalf on Con.*, 14.—A party can not escape the natural and reasonable interpretation, which must be put on what he says and does, by showing that his words were used and his acts done with a different and undisclosed intention. *Foster v. Ropes*, 111 Mass. 10, 16; *Daley v. Carney*, 117 Mass. 288; *Wright v. Willis*, 2 Allen, 191; 2 Chitty Con., 1022. It is not the secret purpose, but the expressed intention which must govern in the absence of fraud and mutual mistakes. A party is estopped to deny that the intention communicated to the other side was not his real intention. To hold otherwise would be to put it in the power of the vendor in every case to defeat the title of the vendee and of those holding under him, by proving that he intended to sell to another person, and so there was no mutual assent to the contract.

In *Boston Ice Company v. Potter*, 123 Mass. 28, cited by the defendant, there was no privity of contract established between the plaintiff and the defendant. There was no evidence offered in the conduct and dealings of the parties, that the defendant assented to any contract whatever with the plaintiff. A stranger attempted to perform the contract of another party with the defendant. In *Hardman v. Booth*, 1 H. & C. 803, there was abundant evidence that the contract was with another party to whom the goods were sent, and not with the person who obtained possession of them and sold them to the defendant. In *Mitchell v. Lapage, Holt*, N. P. 253, the goods were expressly bought of a firm which, without the knowledge of the broker, had been dissolved by the withdrawal of two of its members.

We are referred to no case which supports the claim here made by the plaintiff.

Judgment for the defendant.

ABSTRACTS OF RECENT DECISIONS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

September, 1880.

PROMISSORY NOTE—BONA FIDE HOLDER.—The plaintiff, the owner of a negotiable promissory note, indorsed in blank by the payee, before its maturity, delivered it to J, an attorney at law, for collection; and J deposited it, without his indorsement, in the defendant bank, where he kept an account, for collection. At the time the note was left at the bank, and at the time of its maturity and payment, J was owing the bank for advances and otherwise, for more than the amount of the note. Nothing was said when it was deposited, or before its payment, as to J's title or relation to it, and no advance of money was made to him on account thereof. The bank credited J's account with the amount of it when paid, and applied the balance of his account to the payment of his debts to the bank. He was afterwards adjudicated a bankrupt, and the bank made a settlement with his assignees, crediting the amount of this note and receiving a part of their whole claim. The plaintiff first made demand for the proceeds of the note some two years after this settlement, but as soon as he had knowledge that the defendants had received the proceeds. *Held*, that as J was the ostensible owner of the note, and as the bank took it in the regular course of business with no notice expressed, or to be implied from the circumstances, that it was sent for collection only, or that any one else had any interest in it, the plaintiff could not recover. Opinion by COLT, J.—*Wood v. Boylston National Bank*.

TORT—NEGLIGENCE—RIDING ON FRONT PLATFORM OF HORSE CAR.—The plaintiff's intestate got on the front platform of the defendants' horse car, and remained standing in that place until the car approached a drawbridge on the road, when he sat down on the platform with his feet on the front step. He was told by the driver of the car that he had better not sit in that place as it was against the rules of the company and unsafe, to which he made a reply not understood by the witness. He continued, however, to occupy his sitting position on the side of the platform while the car was detained at the bridge some fifteen minutes by an open draw; and remained there until he fell from the car after it had passed the bridge and had just gone over a bend or curve. There was evidence tending to show that when the cars came to this curve, there was unusually strong jerking, if the cars were going at any speed. There was conflicting evidence as to the rate of speed of the car, but no evidence that it was unusual or unlawful at that place. Notices were posted on the under side of the roofs of the platforms that, by order of the directors, all persons were forbidden to be on the front platform, and that the company would not be responsible for the safety of any passenger while there. *Held*, that the plaintiff's intestate was not in the exercise of due care, and that judgment must be for defendant. Opinion by COLT, J.—*Wills v. Lynn, etc. R. Co.*

RAILROAD—INJURY AT GRADE CROSSING—STATUTE—NEGLIGENCE.—In an action of tort to recover for injuries received at a grade crossing of a highway by a railroad, the declaration alleged that the said injuries were occasioned "by reason of the carelessness and negligence of the agents and servants of the defendant." The statutes of this Commonwealth

require that the bell of the engine should be rung and the whistle blown on approaching such crossing, and also that, upon request of the selectmen of the town, or the order of the county commissioners, a gate or flagman should be placed at such crossing; but no such request or order had been made relative to said crossing. *Held*, that the whole question of what other precautions, in addition to ringing the bell and blowing the whistle, were reasonably necessary, was open to the jury under the declaration, and it was their duty to consider whether, although no gate or flagmen had been ordered, it was not still the duty of the corporation to provide them. Opinion by COLT, J.—*Eaton v. Fitchburg R. Co.*

TORT—DANGEROUS PASSAGE-WAY—LIABILITY OF OWNER.—The plaintiff was injured by falling from a wall by the side of a passage-way leading from the street to the front entrance of the defendants' church edifice, which passage-way was alleged to be dangerous from the want of a railing or other protection against such an accident. The plaintiff attended in the evening a religious meeting in the defendants' said edifice, and was injured while passing from the same to the street. Said meeting was the meeting of a conference of congregational churches in the vicinity of Boston, which included the church connected with the defendants' society, and also the church in Brighton of which plaintiff was a member. Said conference was an organization distinct from the religious societies of which it was composed, and its periodical meetings were held in the houses of worship of the different churches by turn. There was evidence that said meeting was held in the defendants' church by permission of the pastor, approved by the officers of the church and society having the care and custody of the building, and the right to grant the use of it for religious services. In accordance with the usages of the conference, notices were sent to the several churches, containing a general invitation to all the members of the same to attend this meeting, and one of said notices was read from the pulpit in said Brighton Church the Sunday previous. *Held*, that this evidence would justify the jury in finding that the plaintiff came upon said way by the defendants' invitation; and, also, that said way, in the night time, was unsafe for the use of a person exercising ordinary care and prudence; and that, from the foregoing facts, the defendants were liable. Opinion by COLT, J.—*Dairs v. Central Congregational Society.*

SUPREME COURT OF ALABAMA.

December Term, 1879

CARRYING CONCEALED WEAPONS — PRACTICE — JURY.—1. It is not necessary for the record, in a criminal case, to show affirmatively that the grand jurors were drawn in the presence of the officers to whom that duty is committed by law; if they were not so drawn, that is matter for plea in abatement. 2. It is no excuse for carrying a pistol concealed about the person, that the accused was engaged to play a part in which a pistol was to be used, in a school exhibition to take place on another day. Affirmed. Opinion by MANNING, J.—*Preston v. State.*

MASTER AND SERVANT—WRONGFUL DISMISSAL—ACTION—DAMAGES.—1. When a person contracts to perform personal services for another, for a particular term, at stipulated wages, and is discharged, without fault on his part, before the expiration of the term,

he may regard the contract as broken, and immediately sue and recover all the damages he may sustain from the breach up to the time of the trial; or he may treat the contract as still continuing, and holding himself in readiness to perform it, may recover the entire wages due on the expiration of the term; and if the wages were to be paid by installments, he may recover each installment as it falls due. 2. But, if the person so discharged has an offer or an opportunity of similar employment by another person during the term, it is his duty to accept it; he can not purposely reject it, and remain unemployed during the term, in order to increase his recovery against his first employer; and the latter may, when sued, show such offer or opportunity and refusal, to reduce the amount of damages. 3. This principle, however, extends only to the offer or opportunity of the same or similar employment, and in the same place as the first; and when the contract is made by a father for his minor son, an element of personal trust enters into it, which would justify the refusal of an offer of similar employment by another person, unless it is shown that no reasonable objection could be made to his capacity, reputation, habits, morals, or mode of transacting business. 4. If the employer, at the time of discharging the person employed, assign the want of business as the reason of the dismissal, this does not estop him, when sued, from showing misconduct on the part of the person employed, or other adequate cause of dismissal, existing and known to him at that time. Affirmed. Opinion by BRICKELL, C. J.—*Strauss v. Mertief.*

BURGLARY—INTENT.—1. A servant employed by an attorney in and about his office, and entrusted with the key to the front door, may be convicted of burglary if he enters the office at night, with the aid of the key, with the intention at the time of stealing the money of his employer while asleep in an inner room; but if he were in the habit of sleeping in the office, without objection from his employer, and entered with the intention only of going to bed, though he afterwards formed the design to steal, and attempted to do so, he can not be convicted of burglary. 2. In this case, as there "was no evidence that the defendant had opened the door of the office at all, as there was none that it was shut before he entered," the court should have instructed the jury, on his request, that they must acquit him on the evidence. Reversed. Opinion by MANNING, J.—*Louder v. State.*

LIQUOR SELLING—EVIDENCE—MEANING OF "IN-TEMPERATE HABITS."—1. To authorize a conviction under an indictment for selling spirituous liquor to a person of known intemperate habits, three essential facts must be proved; that the defendant sold such liquor to the person named; that such person was of intemperate habits; that the defendant had knowledge of his intemperate habits; and each of these facts must be proved to the satisfaction of the jury beyond a reasonable doubt. 2. As tending to prove the defendant's knowledge of the intemperate habits of the person to whom the liquor was sold, general reputation, or general character in the neighborhood, is admissible evidence, to be weighed by the jury, in determining whether it was known to the accused. 3. "Intemperate habits," within the meaning of the statute, can not be predicated of a person who occasionally drinks to excess. But it is not necessary to show that he is drunk every day. If sobriety is the rule, and occasional intoxication the exception, he is not within the statute; and, on the other hand, if the habit is to drink to intoxication when occasion offers, and sobriety or abstinence is the exception, the charge of intemperate habits is made out. 4. A witness may testify that the person to whom the liquor was sold

"was of intemperate habits," and that his intemperate habits were generally known in the neighborhood in which the liquor was sold. Reversed. Opinion by STONE, J.—*Tatum v. State*.

EVIDENCE—CHILDREN AS WITNESSES.—1. The admissibility of children as witnesses depends not merely upon their possessing a competent degree of understanding, but also, in part, upon their having received such a degree of religious instruction as not to be ignorant of the nature of an oath, or of the consequences of falsehood. 2. When a child of tender years is produced as a witness in court, it is the duty of the presiding judge to examine him or her, without the interference of counsel further than the judge may choose to allow, in regard to the obligation of the witness' oath; and, in a proper case, to explain the same to one intelligent enough to comprehend what he says, and then to determine whether or not the child shall be sworn and permitted to testify. 3. *Held*, that a little negro girl, about nine years old, was improperly permitted to testify in this case, when the only evidence as to her competency was that, in answer to questions put to her by the defendant's counsel, she said, "that she did not know what the Bible was; had never been to church but once, and that was to her mother's funeral; did not know what book it was she laid her hand on when sworn; had heard tell of God, but did not know what it was; and said if she swore to a lie she would be put in jail, but did not know she would be punished in any other way." Reversed. Opinion by MANNING, J.—*Carter v. State*.

COURT OF APPEALS OF KENTUCKY.

September, 1880.

PROMISSORY NOTE—CONSIDERATION—SEDUCTION—FORBEARANCE TO SUE.—The admitted facts in the pleadings in this case are: The sole consideration of the note sued on was the agreement to forbear the prosecution of suit by Susan Cline *v.* Appellee, that the suit was brought by Susan Cline against appellee for seduction, and that at the time she was an adult unmarried woman; that at the time of the alleged assignment of the note by Susan Cline to appellants they had full knowledge of all the facts. It is further shown in evidence that the note before maturity was discounted to the German Security Bank, and having been protested for non-payment it was taken up by appellants. The questions in the case are: First. Was the note unenforceable for want of consideration? Second. Are the rights of the parties altered by the fact that the note was put on the footing of a foreign bill of exchange by discounting it at the bank? *Held*, that there is no cause of action either at common law or under the statutes in behalf of a woman for seduction. *Woodward v. Anderson*, 9 Bush, 624. An agreement to forbear to prosecute a claim which is wholly and certainly unsustainable at law or in equity, is no consideration for a promise. *Parsons on Contracts*, Vol. 1, p. 440; *Chitty on Contracts*, Vol. 1, pp. 35-46. The effect of the statute in regard to discounting of notes in bank, so as to place them on the footing of bills of exchange, is to fix the rights and liabilities of the parties as they would be if the paper had originally been a foreign bill of exchange. As appellants received the note sued on with the knowledge that it was without consideration, they took it up from the bank with the same right in appellee to make defense as he had prior to the discounting; and being holders with notice of the infirmity in

the bill, it is in their hands subject to all the defenses that existed between the original parties to the paper. Judgment affirmed. Opinion by HINES, J.—*Cline v. Templeton*.

SURETIES—RELEASE OF, BY ACTS OF PAYEE.—Appellant was surety for one Hopkins on a note for \$975, executed to Martha Duerson (Mrs. Snapp), on the 16th of February, 1875, due one day after date. Hopkins was, on his own petition, adjudged a bankrupt April 6, 1878. Mrs. Snapp, on the 22d of April, 1878, her husband consenting, proved the debt against said bankrupt's estate, and on the 2d of June following consented by a writing to the discharge of Hopkins, without regard to the relative amount of his assets, and the debts proved against his estate. Other creditors subsequently signed the writing consenting to his discharge, until the requisite one-fourth in number and one-third in amount were obtained, after which the writing was filed in the bankruptcy proceedings. Upon notice Mrs. Snapp was permitted by the bankruptcy court to withdraw her consent December 24, 1878. Hopkins has not been discharged, and it is claimed by appellant that he is entitled to judgment discharging him from liability as surety. *Held*, that in consenting to the discharge of Hopkins, the payee, Mrs. Snapp, released the appellant as security on the note for Hopkins, and that the subsequent withdrawal of consent does not alter the case, there being no *locus penitentiae* in such cases. Judgment reversed and cause remanded, with directions to overrule the demurrer to defendant's answer. Opinion by COFER, C. J.—*Calloway v. Snapp*.

CONSTITUTIONAL LAW—RETROSPECTIVE LEGISLATION—EFFECT UPON CONTRACTS—WHEN PROHIBITED.—A note was executed in February, 1870, by W. J. Lusk, with the decedent, Samuel Lusk, as surety, to Samuel Holmes for \$2,700, due in January, 1871. Samuel Lusk, the surety, died in February, 1872, and his personal representatives shortly thereafter qualified. By the 53d sec. of ch. 39 of the Gen. Stats., which took effect December 1, 1873, it is provided that "no interest accruing after his death shall be allowed or paid on any claim against a decedent's estate, unless the claim be verified and authenticated as required by law, and demanded of the executor, administrator or curator, within one year after his appointment." The note in controversy was not presented for payment to the executors of Samuel Lusk within one year after their qualification; and it is claimed by appellees that no interest can be collected from the estate of Samuel Lusk that accrued after the qualification of his executors. *Held*, that as the death of the decedent, as well as the qualification of his executor, occurred long before the General Statutes took effect, the section relied on by the appellees can not be made to apply. While retrospective legislation is not prohibited in cases where it does not affect or impair the obligation of a contract, it is manifest, from the language of the section, that the legislature did not intend the law to apply to cases where the representatives of the deceased debtor had qualified before the law took effect. If the law-making power had intended the section in question to apply to cases where the appointment of a personal representative had already been made, it would have provided that all claims against decedent estates should be presented within a certain period after the passage of the act, or no interest should be allowed. Nor do we mean to say that such a law would prevent the party from recovering the interest that had accrued at the time the act passed. Judgment reversed, and cause remanded for further proceedings consistent with this opinion. Opinion by PRYOR, J.—*Holmes v. Lusk*.

MORTGAGE LIENS—PURCHASE OF MORTGAGED

PROPERTY—EFFECT OF, WHEN ITS CHARACTER IS CHANGED.—The appellants, as assignees of a mortgage executed by Caldwell, Eaton & Co., to the Mississippi Valley Life Ins. Co., instituted this action in equity to subject to the lien created by the mortgage a number of cottage buildings. The land, with the cottages upon it, had been sold, after the execution of the mortgage to the insurance company, to the Louisville & Southwestern Railroad Company, and that corporation having purchased the property for depot purposes, sold the cottages to one of the appellees, Patrick Bannon, who removed them to lots of which he was the owner. The cottages and ground upon which they stood were then mortgaged by Bannon to his co-appellees, the Hibernian Building and Loan Association. The sole object of the action is to subject the cottages on Bannon's land, and mortgaged to the building association, to the payment of the mortgaged debt, or so much of it as remains unsatisfied. The chancellor below dismissed the petition. It is maintained by the appellants that the lien followed the cottages to the land of Bannon, and the appellees having constructive notice of the lien by the mortgage on record, the cottages should have been sold to discharge the lien. *Held*, that the mortgagee had only a lien on the property for the payment of his debt, and could only enforce it by going into a court of equity and subjecting the property to its payment. No action for waste can be maintained by the mortgagee against the mortgagor while the latter is the owner and in possession, nor would the chancellor, upon a bill filed to stay waste, interfere unless the waste complained of endangered the rights of the lien creditors. While the alienation of the land itself by the mortgagor can only be made subject to the mortgage, his right to cut timber, tear down buildings and to do all other acts in regard to his property that he may deem necessary for his interest, is not affected by the mortgage. He may be restrained from committing waste, and can no doubt be held liable when he impairs the value of the estate mortgaged so as to endanger the rights of the lien creditors; or, in other words, he is liable for the debt in any event, if the property when subjected fails to satisfy it; but when the timber he cuts upon the land, or the house that he pulls down and sells to another, is removed and becomes a part of the land by accession or otherwise, it is beyond the reach of the mortgagee's lien. In the case of *Cooper v. Davis*, 15 Conn., the mill stones from a grist mill had been sold by the mortgagor and removed by the purchaser; it was held, in an action by the mortgagee to recover the property, that the title passed to the purchaser and the appropriate remedy for a mortgagee, when his security is being impaired, is by a bill in equity for an injunction. See *Peirce v. Goddard*, 22 Pick., and *Buckout v. Swift*, 27 Cal. The chancellor acted properly in dismissing the petition, and the judgment is now affirmed. Opinion by *FRYOR, J.*—*Harris v. Bannon*.

SUPREME COURT OF WISCONSIN.

September, 1880.

DEED—ACCEPTANCE—PROMISSORY NOTE—PAROL AGREEMENT.—1. The acceptance by the grantee, of a deed or land contract executed by the grantor alone, binds such grantee. 2. Plaintiff sold, assigned and delivered to defendant, for an agreed consideration in money, certain notes and mortgages of a third party, and all his interest in a contract for the sale of certain lands by him to such third party, the assignment be-

ing in writing under seal, executed by the plaintiff alone, and containing a statement of the consideration and stipulations for the security of the plaintiff, and as to the effect of a default by the defendant to make the payments therein specified; and in execution of said agreement defendant paid a part of the sum named as consideration, and delivered to plaintiff his three promissory notes for the remainder. In an action on the notes: *Held*, that defendant can not prove a contemporaneous oral agreement, by which, in case the timber on the lands described in the contract should fall short of a certain amount, he was to be allowed at a certain rate per M. for the shortage, and that there was such a shortage. *Reversed*. Opinion by *LYON, J.*—*Hubbard v. Marshall*.

FRAUD—RESCISSION OF WRITTEN INSTRUMENTS WHEN NOT GRANTED.—1. Written instruments will not be cancelled or rescinded on the ground of fraud, except upon clear and convincing proofs. 2. Where a married woman sues to set aside a conveyance of her land executed by herself and her husband, on the ground that its execution was procured by defendant's fraudulent misrepresentations, if it appears that the negotiations which resulted in its execution were all between the defendant and the plaintiff's husband acting as her agent, she is bound by his acts, and the case is as if the husband had been owner of the land and plaintiff in the action. 3. In this case, in the absence of any sufficiently clear and convincing proof of the alleged fraud, this court reverses the judgment below cancelling the conveyance. Opinion by *LYON, J.*—*Lavassar v. Washburne*.

MARINE INSURANCE—CONSTRUCTION OF POLICY.—1. A contract of marine insurance upon a steam tug provided that the insurer should not be liable for losses arising from "incompetency of the master or insufficiency of crew, and want of ordinary care or skill in navigating said vessel." It appeared that the master, while navigating Lake Michigan, the fuel being exhausted, let go the anchor in a storm, and with his crew abandoned the tug and went ashore; and that a few hours afterwards the cable parted and the tug was wrecked. In this action upon the policy the jury found specially that the master did not do "all that a skilful, careful and prudent seaman could do to prevent the wrecking of the boat," and that it was his duty "to remain on board of the tug, or leave a man there to attend to the cable;" but to the question, "Did the master leave said boat only when, in his opinion, to stay longer would endanger the life of himself and the crew," they also answered "Yes." On appeal from a judgment in plaintiff's favor: *Held*, that the findings are so inconsistent as to require a new trial. 2. To render a ship "seaworthy," within the meaning of a contract of insurance, she must be sufficiently furnished with proper cables and anchors. *Reversed*. Opinion by *COLE, J.*—*Lanton v. Royal Canadian Ins. Co.*

CRIMINAL EVIDENCE—PARTY AS WITNESS—CONDUCT OF TRIAL—INSTRUCTIONS—VERDICT.—1. Under our statute which provides that "in all criminal actions and proceedings, the party charged shall, at his own request, but not otherwise, be a competent witness, but his refusal or omission to testify shall create no presumption against him" (Rev. Stats., sec. 4071) the voluntary testimony of such party on his preliminary examination may be put in evidence by the State upon his trial. 2. It is generally within the sound discretion of the court to allow a witness who has been discharged from the stand, to be recalled for further cross-examination, even where other proceedings have intervened. 3. After defendant who had testified in his own behalf, had rested, and after the introduction of some rebutting testi-

mony, the court permitted the prosecution to recall him for further cross-examination; but this consisted merely in asking him whether he signed a letter then shown to him; and he answered that he did not, and the contents of the letter were not disclosed. *Held*, no ground for a new trial. 4. The judge read to the jury from his written charge three forms of verdict, and afterwards wrote out the same forms separately and passed them to the jury before they retired, defendant's counsel expressly consenting thereto. *Held*, no error; nor was such consent necessary. 5. An oral statement to the jury that they should find one of said three verdicts, and that their foreman should sign the verdict as found, *held* no part of the "charge" which the statute required to be reduced to writing. 6. Verdicts may be received in writing in the first instance; but if that were otherwise, a polling of the jury, and the assent of each to the verdict as read, would cure the error. Affirmed. Opinion by LYON, J.—*State v. Glass*.

SUPREME COURT OF INDIANA.

September, 1880.

SHERIFF'S SALE—WHEN LEGAL TITLE VESTS IN PURCHASER—WIFE'S INTEREST.—When the time for redemption has expired, and the sheriff's deed has been executed, the legal title of the execution defendant in the real estate sold, vests in the purchaser, not as of the date of the sheriff's deed, but as of the date of the sheriff's sale. 17 Ind. 64; 22 Ind. 55; 23 Ind. 91; 60 Ind. 478. And where a sale was made under foreclosure of a mortgage in which the wife had not joined; and, after such sale, the mortgagor and his wife deeded the real estate to another: *Held*, that such grantee could bring suit for partition, and to have the one-third of such real estate set-off to him before the year of redemption had expired, under the act of 1875 (1 Rev. Stat. 554), which provides that the inchoate interest of a married woman may be set-off to her whenever, by virtue of any sale, such inchoate interest becomes absolute. Affirmed. Opinion by HOWK, J.—*Hollenback v. Blackmore*.

CRIMINAL LAW—INDICTMENT—PLEADING—EVIDENCE.—1. Where the verdict of a jury finds the defendant guilty upon one count of an indictment, and is silent as to the other counts, it is equivalent to a verdict of not guilty on such counts. 7 Blackf. 186; 56 Ind. 101. Therefore the overruling of the defendant's motion to quash such counts presents no question that will be considered in the Supreme Court. 2. The charge of an assault is included in a charge of assault and battery, and if a defendant is charged only with an assault and battery with a felonious intent, he may be convicted of an assault merely, with or without the intent, according to the evidence. 54 Ind. 63; 66 Ind. 241. 3. In an indictment for an assault and battery with intent to commit a robbery, it is not necessary to describe the particular property which the defendant intended to take from the person upon whom the assault and battery was committed. 68 Ind. 38. 4. A prosecution for such crime must be commenced within two years after the commission of the offense, and where the evidence fails to show that the prosecution was commenced within such time, the judgment against the defendant will be reversed. 18 Ind. 492; 34 Ind. 104; 56 Ind. 207. Reversed. Opinion by HOWK, J.—*Dickinson v. State*.

PLEADING—PLEA IN ABATEMENT—PAYMENT.—1. In a suit by a foreign corporation to collect a debt in

this State, an answer alleging that the plaintiff has not complied with the law of this State so as to authorize it to do business herein, is good as an answer in abatement upon demurrer. 54 Ind. 270. 2. An answer in abatement, not verified, may be struck out on motion for that cause; but if an issue, whether of law or fact, be formed upon such unverified answer, the objection to its want of verification is waived. 58 Ind. 521; 20 Ind. 528; 44 Ind. 413. 3. In an action to recover the value of a mower, the defendant answered, "that before the commencement of this suit he fully paid the amount demanded to plaintiff's agent," etc. *Held*, this was not equivalent to an averment that the demand sued on was fully paid. The defendant might have paid all that was demanded of him at a certain time, and yet not all that was sued for in this action. The demurrer to this answer should have been sustained. 4. A single pleading can not perform the double function of an answer and a counterclaim. 68 Ind. 356; 50 Ind. 269. Reversed. Opinion by NIBLACK, J.—*Toledo Agricultural Works v. Work*.

ATTACHMENT—CONTRACT WITH INDIAN—UNITED STATES STATUTE CONSTRUED.—In an attachment proceeding against an Indian woman, appellant was summoned as garnishee and answered that he had received from the United States certain money of the defendant, who agreed that he should draw said money for her and apply it to her indebtedness to him, and that he had done so. The court found that the defendant had made the verbal agreement alleged by the garnishee, but held that it was void under the laws of the United States. R. S. 1873-5, p. 370. *Held*, the statute cited applies only to such agreements as have been made with Indians, not citizens of the United States, "in consideration of services for said Indians, relative to their lands, or to any claims growing out of or in reference to annuities, installments, or other monies, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States." Such agreements must be in writing and officially approved. *Held*, also, that as it was not shown that the indebtedness of the Indian woman in this case came within the provisions of the statute, or that it was not for money loaned or necessities furnished her by the garnishee, her agreement was not void under said statute. Reversed. Opinion by HOWK, J.—*Godfrey v. Scott*.

SUPREME COURT OF ILLINOIS.

September, 1880.

TRUST DEED—NOT A LIEN UNTIL MONEY PAID—REGISTRATION—PRIORITY—NOTICE—COSTS.—1. The mere recording of a deed of trust to secure a loan of money, does not create a lien upon the property when the money has not in fact been paid over to the borrower. It becomes a lien against the rights and equities of a third person under prior unrecorded mortgage or trust deed only from the time the money is in fact paid. 2. Where the owner of real estate gave a deed of trust to A to secure a prior indebtedness to B, which was left with the trustee to be placed on record, and afterwards C, in good faith, made a loan to the owner, taking notes and a second deed of trust to A, to secure the same, which was placed on record on the same day, but no money was in fact paid by C to the borrower until some ten or twelve days after the recording, and the prior trust deed was recorded at the same time the money was

advanced to C: *Held*, that under our recording law, neither of the trust deeds could be regarded as prior to the other, and that as the legal and equitable rights of B and C were equal, the equities of B, being first in point of time, must prevail over those of C. 3. It is immaterial whether a deed of trust was delivered to the trustee or not before it is recorded, to affect a subsequent purchaser with notice of the equities of the *cestui que trust* in the land therein conveyed. 4. The awarding of costs in suits in equity is a matter of discretion in the court below. Affirmed. Opinion by DICKEY, J.—*Schultze v. Houfes*.

MARRIAGE—COMPETENCY TO MAKE CONTRACT—ACTION.—1. Persons having a husband or wife living are not competent to contract marriage, and no presumption of a marriage can be indulged from cohabitation by such persons. 2. The statute does not prohibit or declare void a marriage not solemnized in accordance with its provisions. A marriage without observing the statutory regulation, if made according to the common law, will be good. 3. By the common law, if the contract be made *per verba de presenti*, it is sufficient evidence of marriage, or if made *per verba de futuro cum copula*, the *copula* will be presumed to have been allowed on the faith of the marriage promise, if at the time of the *copula* the parties accepted each other as husband and wife. It is the consent of the parties, and not the concubinage, that constitutes valid marriage. 4. A contract of marriage *per verba de futuro*, while it may give an action, is not evidence of valid marriage; nor are the relations of the parties changed by the fact that cohabitation may have followed the promise to marry at a future time. A contract of marriage in the future, even where the parties may afterwards cohabit, is not understood to constitute marriage, unless the parties at the time of the cohabitation accept each other as husband and wife, and so conduct themselves that that relation is understood and acquiesced in by relatives and other acquaintances. Reversed. Opinion by SCOTT, J.—*Hibbithwaite v. Hepworth*.

NEGLIGENCE—RAILROAD KILLING STOCK—ACTS OF SERVANTS.—Where a coal train, in passing through a village, was running at the rate of fifteen or twenty miles an hour, and as the same approached, certain employees of the railroad, out of sport, threw stones at a person's hogs running at large, in such a manner as to make a sow run upon the track in front of the locomotive when she was struck and killed by the train: *Held*, that the speed of the train through the village was too fast for prudence, and that the stoning of the hogs was wilful, and the company was clearly liable for loss to the owner of the sow. Affirmed. Opinion PER CURIAM.—*Cairo, etc., R. Co. v. Howes*.

OFFICERS—ACTS SHOWING ABANDONMENT—IMPLIED RESIGNATION.—1. When an alderman elected under a special charter is elected in the same ward at different date on the assumption of the adoption by the city of the general law relating to cities, etc., and after a decision that the general law was not legally adopted, refuses to attend the meetings of the council, or appear on notice to show why he should not be removed, his subsequent election and refusal to attend the council meetings may be treated as abandonment of his office under the prior election, or as an implied resignation, and the office may be filled as in case of a vacancy. 2. One of the modes by which a member or officer of a municipal corporation may be said to impliedly resign his office, is by being elected and accepting an office incompatible with the duties of the former office. Affirmed. Opinion by SCOTT, J.—*People v. Hanifan*.

QUERIES AND ANSWERS.

[*.* The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.]

QUERIES.

44. A negotiable promissory note is made payable at "The State Bank" at Kansas City, Mo. A notary certifies under his seal, without affidavit, that he "presented the same at the — Bank, which now occupies the rooms formerly occupied by 'the State Bank' in said Kansas City to the officers of said — Bank, and demanded payment thereof," etc. * * * "and I gave notice thereof," etc. 1st. Is such demand, and due notice thereof to an indorser, sufficient to hold the indorser? 2nd. Is the certificate without affidavit admissible in this State under sec. 20, p. 218, 1. W. S., or must it be made under affidavit, as provided by sec. 50, p. 598, 1. W. S.? These questions arose prior to 1879. L. Rolla, Mo.

ANSWERS.

43. [11 Cent. L. J. 278]. It may be regarded as fully settled that a grant of letters testamentary in one State or jurisdiction, does not confer any authority to bring an action in such representative capacity in another State or jurisdiction. *McClure v. Bates*, 12 Iowa, 77; *Vaughn v. Northrup*, 15 Pet. 1; *Atkins v. Smith*, 2 Ark. 63; *Noonan v. Bradley*, 9 Wall. 394; *Parsons v. Lyman*, 20 N. Y. 103; *In re Webb*, 11 Han. 124. The authorities are cited quite fully in *Rorer's Inter-State Law*, 250, 251; *Story Conf. of Laws*, secs. 512, 513 and notes. A debt due upon an ordinary contract, to a testator or intestate, can only be sued by his representatives in their capacity as such. 1 Chit. Pl. 16 Am. Ed. 22, 36. It is therefore clear that no action would lie in Iowa by the foreign executor, nor in his own name and right, on such a contract. The note is such an ordinary contract unless payable to bearer, or indorsed by the payee. The querist does not say how it is as to this note—although all material. In a work of much authority it is said: "So if the instrument were the property of the decedent, and were payable to bearer, the executor is the bearer and may treat it as his own, * * * and may sue in his own name or in his representative capacity." *Bliss*, Code Plead. § 53. The same rule (citing same cases) is laid down as to foreign executors in *Rorer's Inter-State Laws*, p. 261. The cases cited are *Mowry v. Adams*, 14 Mass. 327; *Bright v. Currie*, 5 Sandf. 433; 4 Hill, 107; 28 Wis. 321; 16 Iowa, 430; *Sanford v. McCreedy*, 28 Wis. 102; 9 Wend. 425. With deference I do not think the cases cited, unless the last, support the proposition, as the question was not before the courts. In every case cited, except 28 Wis. 102, the action was one accruing since the death of the testator or intestate, as in 16 Iowa, 430, and the rule is unquestioned now that on a liability accruing to an executor after decease of testator, he may sue in his own name. Indeed that is the most proper form. 6 N. Y. 163; 3 Barb. Ch. 71; 10 Sn. & M. (Miss.) 607; 9 Wend. 302; 13 Wend. 591. It may be true as said by Lyon, J., in 28 Wis. 106, that the note being payable to bearer, "the mere production of the note on the trial was sufficient *prima facie* to entitle him to judgment." But that does not avoid the difficulty. A late case in the Court of Appeals of New York, decided under a similar code provision to that of Iowa, as to the real party in interest, held (reversing 10 Hun, 511) what I think must be the true rule, viz.: "To entitle a party to maintain an action upon a promissory note, he must be the legal owner, and have the right to possession. The production of the note payable to bearer, or properly indorsed, is sufficient *prima facie* evidence of title, but liable to be rebutted." *Hays v. Hathorn*, 74 N. Y. 486. My answer, therefore, is: 1. That the foreign executor can not sue as such. 2. That on a liability or debt due the deceased, though in the form of a note payable to bearer, he can not, under a statute like that of Iowa, cited, sue in his own name. The executor should procure "ancillary letters to be taken." D. L. A. Sherburne, N. Y.

CURRENT TOPICS.

The circumstances under which a court of equity will not interfere to restrain a threatened injury to real property, are illustrated by the case of *Smith v. City of Oconomowoc*, recently decided by the Supreme Court of Wisconsin. The plaintiff asked for an injunction against the city officers who, it was alleged, were about to remove a fence and storm door in front of his building; the city alleging that they were encroachments upon one of its streets. The circuit court granted the order, in reversing which the Supreme Court says: "We are of opinion that the court should have dismissed the action as not properly within the equity powers of the court. The city must be supposed to be abundantly able to pay any damage which the plaintiff may sustain if its officers shall remove the fence and door; and as the complaint does not show that the plaintiff will be greatly incommoded in the use and occupation of his premises by their removal, he should be left to his ordinary action at law, both to establish his right and to recover his damages. If this action can be maintained in a court of equity, then every threatened trespass upon real estate, of the most trivial kind, will be a ground for a suit in equity to restrain such trespass. If this action can be sustained, then every attempt on the part of town or county officers to remove obstructions from the highways of such towns or counties may be restrained by a court of equity, without first having the legal right determined in an action at law. In cases of this nature there is no reason for the interference of a court of equity in the first instance. The threatened damage being such as can well be compensated in damages in an action at law, the legal rights of the parties should be determined in such an action. Ordinarily, one action at law will determine the matter. It will be time enough for the plaintiff to invoke the restraining arm of a court of equity when he shall have established his right by a judgment in an action at law for an actual trespass committed, and when, notwithstanding such judgment, the city and its authorities shall threaten to repeat the trespass. The complaint and evidence in this case discloses nothing but a threat on the part of the city, under a claim of right, in order to protect its streets from illegal obstructions and encroachments, to do an act which, if not authorized, would be a trespass upon the plaintiff's realty resulting in but slight damages, and not in any way doing what in the law is termed an irreparable injury to his property." The court distinguished the case from that of *Wilson v. Mineral Point*, 39 Wis. 160, where the city by its officers, threatened to open a street through the plaintiff's garden and grounds, and to destroy his shrubbery, fruit and ornamental trees—a damage which might be compensated in money, but a destruction of property which could not be restored to its former condition by the labor of man alone, nor with his labor aided by the forces of nature, except after the lapse of many years. See, also, *Sheboygan v. R. Co.*, 21 Wis. 667; *Judd v. Fox Lake*, 28 Wis. 583.

We have more than once deplored the public spirit of this country which seeks to obtain judicial labor as cheap as possible, and consequently often obtains the poorest quality. We have more than once affirmed that this shameful penuriousness is confined to judicial officers; that while ministerial officers, either by fees or salaries, only require to hold their positions for a few years, in order to leave them opulent, our

judges are barely able to make their salaries cover their current expenses; that while the public in dealing with administrative and executive officers is often prodigal, in dealing with judicial officers it is always stingy. Some months ago, in the *New York Graphic*, the public found its apologist in a writer who undertook to show by statistics that the expenditure for judicial services was larger in America than in England. Thirty-four judges, he said, discharged the law business of England at an aggregate cost of less than \$1,000,000, the population served being about twenty-five millions; while New York State alone employed over four hundred and fifty judicial officers, at a compensation of more than \$1,000,000, to administer justice to a population of five million people. But now comes a letter to the *Albany Law Journal*, from a lawyer who has examined the judicial expenses in England with great care, which shows that the *Graphic* has been woefully deceived, or else wilfully misrepresented the facts. The salaries of the Judges of the Supreme Court of Judicature, viz.: the Lord Chancellor, the Chief Justices and the Master of the Rolls are \$250,000. The salaries of the judges of appeal are \$155,000; of the judges of the different divisions of the High Court of Justice, \$650,000; of the assistant judges, \$180,000. This includes the judges of the superior courts alone. The salaries paid to the judges of the inferior courts amount yearly to the sum of \$2,160,000. To this must be added a large number of the chancellors and judges of local courts, who are paid by fees and not by salary, and whose emoluments certainly reach \$1,000,000 a year, if not more. So we have a total of nearly four million and a half dollars as the cost of judicial labor in England. It must be remembered that we have more judges to the population than they have in England. An American citizen has no confidence in the decision of any judge lower than a Supreme judge, and consequently never trusts him with the final determination of even the smallest case. In England the judgment of a county court judge, whose jurisdiction is similar to that of a justice of the peace here, is not appealable; but with us where a man's cow is run over by a locomotive, or a note for fifty dollars on which he is an indorser is not paid by the maker, he sues or is sued, first before a justice of the peace, then if he loses he appeals to the circuit court, and from there to the appellate court. Six or more judges must pass upon his case before it is finally decided, where in any other country one would be considered sufficient for the purpose. When this is taken into consideration the disproportion between the wages which each receives becomes plainer.

RECENT LEGAL LITERATURE.

RECENT REPORTS.

The sixth volume of Bradwell's Reports contains all the remaining opinions of the first, second, third and fourth districts up to August 12, 1880. The opinions cover 643 pages, the index and table of cases extending the volume to 704 pages. The following points, among others, seem to be novel and of general interest: The failure of an alderman to attend the meetings of the city council or perform the duties of his office for five months, is an implied resignation.

Reports of the Decisions of the Appellate Courts of the State of Illinois. By James B. Bradwell. Vol. 6. Chicago: The Legal News Co. 1880.

People v. Hanifan. An alleged custom among wholesale merchants in Chicago to allow their salesmen pay for time lost by sickness, *held*, not valid, as lacking the elements of generality and reasonableness. *Sweet v. Leach.* The coal wagon of A ran into the plaintiff's street car, injuring one of its passengers, for which injury the company was obliged to pay damages. *Held*, that the latter might recover from A damages for injuring its car, irrespective of the special damages to the passenger. *Chicago, etc. R. Co. v. Rend.*

The fifth volume of Mr. Stewart's New Jersey Equity Reports, being the thirty-second volume of the series, is just out, and as usual, contains a variety of matter of great value, not the least of which are the full annotations of the reporter. Among the cases we note the following: A gold refiner having confessed to taking gold intrusted to him to refine, gave while under arrest a mortgage on his property for the amount: *Held*, that the mortgage was not void on the ground of duress; *Smillie v. Titus.* A party will be put to his election between two suits pending, one in a State court and another in the Federal court for that district; *Central R. Co. v. New Jersey R. Co.* V. in consideration of a legacy of \$30,000, verbally promised the testator to give W \$10,000, and after the testator's death admitted the trust in writing, but afterwards retracted it. *Held*, that specific performance would be decreed. *Williams v. Vreeland.* The statute of limitations is not a bar to a suit in equity for the recovery of a legacy payable out of the personal estate only. *Hedges v. Norris.* If a wife deserts her husband without cause, but afterwards repents and wishes to return, but her husband refrains from inducing her to do so in order to make her absence a ground of divorce, her desertion is not obstinate. *Trall v. Trall.* The legitimacy of an heir may be contested, notwithstanding the intestate's recognition of his legitimacy by entries in his family bible, and in other ways, and notwithstanding it was never questioned until after the death of all the ancestry, and just as distribution was to be made. *Bussow v. Forsyth.* The communication of a venereal disease by husband to wife is "extreme cruelty," for which a divorce will be granted. *Cook v. Cook.* Acquiescence by a wife, for seven years, in a divorce obtained by her husband, irregularly, as she avers, the husband having married again and had two children by the second wife will bar her application for a divorce. *Yorston v. Yorston.* Owing to defendant's negligence, petroleum being carried on a railway train, burst its tanks, was set on fire, flowed into a brook, and was carried by the water to and ignited the complainant's barn, at a considerable distance. *Held*, that defendant was liable. *Kuhn v. Jewett.* A testator bequeathed his wife \$5,000, "to be paid to her, as far as can be, out of the insurance money coming to my estate from the insurance on my life." He had three policies on his life, amounting to \$2,500, all payable to his wife, on which he always paid the premiums, which he always kept in his possession, and which he delivered to his executor. He had no other life insurance. *Held*, that the amount of these policies, received by the widow, must be credited on the legacy. *Fort v. Edwards.* In 1875 a wife left her husband, on account of his abuse of marital rights, taking with her their two children, a boy and girl, then aged six and four years respectively. She sued for a divorce, but this

was denied on his promise of conjugal kindness. She refused to return to him, notwithstanding his entreaties. *Held*, that this was not such "misconduct" as should deprive her of the custody of the children, she being capable and willing to maintain and educate them, the boy being of a delicate constitution and they preferring to remain with her, although the father was sober, moral, industrious, and of pecuniary ability. *English v. English.*

THOMPSON'S CARRIERS OF PASSENGERS.

To those who have consulted the author's two volumes on the Law of Negligence it is sufficient to say that his latest work follows them, both in plan and treatment. A number of leading cases upon different heads of his subject; notes containing a discussion of the principles, and a presentation of the subsequent and earlier cases, with their rules and doctrines; a concordance of these cases, showing the relative value of each as an authority, by exhibiting the number of times it has been cited by subsequent judges, and the manner in which it has been regarded. Such a book can not fail to be of great value to the practitioner. We believe the idea which Mr. Thompson has so successfully used in his three latest works, is destined to supplant to a large degree both in popularity and usefulness the old "treatise." It has the advantage of placing before the practitioner the views of the courts as expressed by their most distinguished members; the author meanwhile keeping in the background and exhibiting himself only occasionally. The temper of the bench at the present day is for precedent rather than for opinion, and the attorney who can produce an apposite authority need trouble himself little about an illogical conclusion. When there were but few adjudicated cases, a lawyer's labor was altogether mental; it involved an examination of the principles of natural rights, and a hard reasoning of his case to a court trained in metaphysics and logic no less than in law; at the present day, when there is a case to fit almost every state of facts if you can only find it, his toil is to a great extent physical. Such a book as the one just before us might be happily called a "new and improved" tool of the trade. It is rich in all the information which a lawyer needs who is required to examine any one of its different topics. In the work forty-nine cases are given in full and 1,800 cases cited and discussed. It is divided into seventeen chapters as follows: The Obligation to Receive and Carry; When the Relation of Carrier and Passenger Subsists; The Obligation to Carry According to Advertisement, to Furnish Safe and Convenient Stations and Approaches; Liability of the Carrier for Negligence; Contributory Negligence of the Passenger; Imputed Negligence; Police Duties of the Carrier; Regulations of the Carrier; Liability for Assaults upon Passengers by his Servants; Contracts Limiting his Liability; Use of Another's Means of Transportation; Connecting Lines; Street Railroad Companies; Baggage; Passengers by Water; Remedies; Procedure and Damages. It contains 680 pages, and a complete index, together with the table of cases made on the plan to which we have already referred.

Reports of Cases decided in the Court of Chancery, the Prerogative Court, and on appeal in the Court of Errors and Appeals of the State of New Jersey. John H. Stewart, Reporter. Vol. 5. Trenton, N. J., 1880.

The Law of Carriers of Passengers, Illustrated by Leading Cases and Notes. By Seymour D. Thompson, author of the "Law of Negligence," "Homesteads and Exemptions," "Liability of Stockholders." St. Louis: F. H. Thomas & Co. 1880.

The present year with its accumulated horrors of collision and fire, has directed public attention to the liability of carriers by water. The author's notes to the leading case of *Benett v. Steam. Co.* contain the most complete summary of the Federal legislation on this subject which has been yet offered to the student, and suggest the question whether the intention which prompted that legislation did not, in an endeavor to protect commerce, lose sight of the question of public policy. We doubt very much if any better way will soon be discovered to protect the citizen in dealing with the carrier than the few short and simple rules of the common law afforded him. Regulations may seem to be effective, but they depend too much upon the manner in which they are followed; inspection is good enough in its way, but it rests entirely on the competency and good faith of the inspector. The common law said to the carrier: "When you receive property to transport you must deliver it safely to the person having a right to receive it. If you can not do so you must pay its value. Unless it was lost by the act of God or the enemies of the king have captured or destroyed it—and this you must clearly prove—we can listen to no excuse. Accident or misfortune or events far beyond your control may have rendered it impossible for you to produce the goods, but we can not help you. This may seem a harsh rule to you, but the public interest requires it." The same reason would have amply justified the extension of this doctrine to the case of passengers, but the judges refused to extend it. A majority of the courts, however, thought it applicable to the carriage of animals and live stock. The carrier then being an insurer as to goods and animals, if nothing short of the highest attainable skill and vigilance will prevent injury to them, he is bound to the exercise of that skill and vigilance, or he must answer for the damage. Of course if this does not suffice, he is still liable; but as the less is included in the greater it follows that the law requires of him a lower degree of care when he has a hundred human beings in his charge than when he has a bale of cotton or a drove of cattle—a somewhat startling truth.

It is less than one hundred years since the first action was tried for the recovery of damages for personal injury to a passenger by a carrier. In that case, Lord Kenyon said that when the proprietors of coaches carried passengers, they were bound to carry them "safely and properly." *White v. Boulton*, Peakes Cases, 113, (1791). It was not, however, until the beginning of the present century that the distinction was plainly laid down by Chief Justice Eyre: "It has been said by the counsel for the plaintiff that whenever a case happens even where there has been no negligence, he would take the opinion of the court whether defendants circumstanced as the present, that is, coach owners, should not be liable in all cases, except where the injury happens from the act of God or of the King's enemies. I am of opinion the cases of the loss of goods by carriers and the present are totally unlike. When that case does occur he will be told that carriers of goods are liable by the custom to guard against frauds they might be tempted to commit, by taking goods entrusted to them to carry, and then pretending that they had lost or been robbed of them, and because they can protect themselves, but there is no such rule in the case of the carriage of the person. This action stands on the ground of negligence only." *Aston v. Heaven*, 2 Esp. 533. Thus it was the reputation of the carrier class for dishonesty upon which the common law liability of insurer rested, and as a passenger carrier was not likely to have the same inducement to make away with a human being, he did not come within the reason of the rule. So said the old judges, though they added the further argument, that being

possessed of the power of locomotion and will, he might safely be left to take care of himself. When in *Boyce v. Anderson*, 2 Pet. 150, Chief Justice Marshall found it necessary to consider the liability of a carrier for the loss of a slave, he decided not that the slave being property and liable to be stolen, the carrier should be responsible as a carrier of goods, but that "the doctrine of common carriers does not apply to the case of carrying intelligent beings such as negroes." Because a slave had feelings and volition, humanity and a regard for his health, prevented his being stowed away like a case of merchandise, therefore "he resembled a passenger, not a bale of goods." In dealing with the carrying business of this day, we should not lose sight of the fact that if the carrier is no longer a "robber," he no longer possesses a soul. The danger of confederacy with the footpad and the highwayman has passed away, but the evils and injustice to the public which ensue from the consolidation of corporate enterprises and the stifling of competition are, perhaps, greater. The "locomotive and volition" argument, which had such weight with the judges who first established the law of the liability of passenger carriers, might, perhaps, be applied in the case of a stage-coach, but certainly it loses all its force in our day, when you attempt to apply it to a passenger in a railroad collision or upon a burning steamboat. If carriers were insurers of the lives and limbs of their passengers would we have more of those "accidents" of which we read in our morning newspapers as regularly as we open them? Or would they become rare after a while, like bank defaultations in China, where they hang the directors for such irregularities? Statistics can not answer the question, but the experiment is worth trying, and perhaps will be made before many years.

We return from this digression to note the handsome manner in which the author's work has been presented by the publishers. In typography, paper and binding the book is perfect.

NOTES.

—The Supreme Court of the United States met for the first time for the October Term, 1880, on Monday, the 11th inst. A Washington dispatch says: "All the justices were present except Hunt, Clifford and Field. Mr. Justice Field is expected to take his seat October 18, and the condition of Mr. Justice Clifford is so much improved that it is hoped his absence will be only temporary. No arguments were heard by the court this afternoon, but the Chief Justice announced the call of the docket will begin to-morrow. Among the cases disposed of to-day were those of the Louisiana and Kentucky Lottery companies, assigned for the first day of the term. The Kentucky case, *Cornford v. Thompson*, was dismissed upon motion of Solicitor-General Phillips on behalf of the appellants, and the Louisiana case, *Dauphin v. Key*, was on motion of the attorney-general indefinitely postponed. These suits were abandoned for reasons already stated in these dispatches, viz.: That, according to previous ruling, an application for a *mandamus* can not be sustained against an *ex-officio* officer of the government, since a *mandamus* must issue against an individual and an individual *ex-officio* has no power to obey the writ, even if it should be granted."—Hon. Thomas Duval, United States District Judge for the Western District of Texas, died on Monday last.